IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

**APPEAL NO.449 OF 2005**
**IN**
**COMPANY PETITION NO.857 OF 2004**

Chloro Controls (India) Pvt.Ltd.
15/AJ, Laxmi Industrial Estate,
Link Road,
Andheri (West), Mumbai 400 053. Appellant
(original Respondent)

versus

1. Severn Trent Water Purification
Inc., formerly known as Capital
Controls Company, Inc., having
its principal office at 3000
Advance Lane, Colmar,
Pennsylvania 18915, USA. Respondent No.1
(Original Petitioner)

2. Capital Controls India Pvt.Ltd.
having their office at 15/AJ,
Laxmi Industrial Estate,
Link Road, Andheri (West),
Mumbai-400 053. Respondent No.2
(original Respondent)

Mr.S.H.Doctor with Mr.D.D.Madon, Senior Advocates and Mr.N.A.Agarwal i/b.M/s.B. Munim & Co. for the appellant.

Mr.Shyam A.Divan, Senior Advocate with Mr.Prashant Bhagwati i/b.Mr.Shrawan Shah for the respondents.

**ALONG WITH**
**APPEAL NO.450 OF 2005**
**IN**
**COMPANY PETITION NO.857 OF 2004**

Capital Controls India Pvt.Ltd.
15/AJ, Laxmi Industrial Estate,
Link Road, Andheri (West),
Mumbai-400 053. Appellant
(original Respondent)

versus

1. Severn Trent Water Purification
Inc., a Corporation organised
and existing under the laws of
the State of Pennsylvania,
United States of America, having
its principal office at 3000
Advance Lane, Colmar,
Pennsylvania 18915, USA. Respondent No.1
(original Petitioner)

2. Chloro Controls (India) Pvt.Ltd.
15/AJ, Laxmi Industrial Estate,
Link Road, Andheri (West),
Mumbai 400 053. Respondent No.2
(original Respondent No.1)

Mr.Pratik Sakseria with Mr.A.S.Kamat i/b.M/s.V.Deshpande & Co. for the appellant.

Ms.Rajani Iyer with Mr.Prashant Bhagwati i/b.Mr.Shrawan Shah for the respondent.

**CORAM : R.M. LODHA &**
**ANOOP V. MOHTA, JJ**.

**DATED : 20th/21st February 2006**

**ORAL JUDGMENT (Per R.M.Lodha,J.)**

Severn Trent Water Purification Inc., USA (hereinafter referred to as "the petitioner") filed a petition for winding up the Capital Controls (India) Private Limited (hereinafter referred to as "the Company") on just and equitable grounds under Section 433(f) of the Companies Act, 1956. The learned Company Judge by his order dated 21st April 2005 admitted the company petition. Aggrieved thereby two appeals have been filed. One appeal (449/2005) is by Chloro Controls (India) Private Limited, which has 50% shareholding in

the company and the other appeal (450/2005) is at the instance of the Company. As both the appeals arise out of the common order, we heard these appeals together and by this common order dispose of them.

2. The petitioner set up the case in the petition for winding up thus:

(i) The petitioner is a Corporation organized and existing under the laws of the State of Pennsylvania, USA having its office and place of business at 3000 Advance Lane, Colmar, Pennsylvania 18915, USA.

(ii) The petitioner was formerly known as Capital Controls Company, Inc.

(iii) In or about the year 1990, the petitioner's group acquired Capital Controls Company, Inc. and subsequently the name of Capital Controls Company, Inc. was changed to Severn Trent Water Purification, Inc. with effect from 1st April 2002.

(iv) On March 31 2003 Capital Controls (Delaware) Company Inc. merged with and into the petitioner and pursuant to the merger Capital Controls (Delaware) Company, Inc. went out of existence.

(v) That the reference to the petitioner includes reference to the Capital Controls Company, Inc. as well as Capital Controls (Delaware) Company, Inc. and, therefore, the petitioner in its present name is entitled to the rights and benefits of the Capital Controls (Delaware) Company, Inc. and Capital Controls Company, Inc. and to file and maintain the company petition.

(vi) The Chloro Controls (India) Private Limited - a company controlled by Mr.M.B.Kocha and Capital Controls (Delaware) Company, Inc. set up joint venture company - Capital Controls India Private Limited (the company) in Mumbai with the object of manufacturing (in India) and distributing within the geographical boundaries of India, Nepal, Bhutan and Afghanistan certain gas chlorination water treatment systems and a single product line of brine electro chlorination systems from component parts supplied by the petitioner.

(vii) Authorised capital of the company is Rs.75,00,000 (Rupees seventy five lakhs) divided into 7,50,000 equity shares of Rs.10/- each. The petitioner holds 3,75,000 equity shares being 50% of the equity share capital of the company. The other 50% of the shareholder of the company is Chloro Controls (India) Private Limited.

(viii) Chloro Controls (India) Private Limited has filed Suit No.233/2004 with the object of circumventing the dispute resolution provisions in the joint venture agreement entered into between the parties.

(ix) That due to the wrongful stand and intransigence of Chloro Controls (India) Private Limited, the parties have deadlocked on several joint venture and management issues and despite several meetings between the parties and exchange of idea aimed at resolving differences, relations between the parties have become more strange.

(x) The petitioner has terminated the joint venture agreement vide its letter dated July 21, 2004 due to the breaches committed by Chloro Controls (India) Private Limited and Mr.M.M.Kocha and in the termination notice called upon Mr.Kocha to initiate winding up of the company.

(xi) If Mr.Kocha is allowed to continue to run the company, the basic substratum of the company will be eroded and the company could inter alia be saddled with liabilities leading to depletion of net worth, third party claims.

(xii) The company has been incorporated in the nature of partnership and both parties have equal share in the company, the parties are severely deadlocked on several issues and the petitioner has lost confidence in the Kochas and do not believe that they will return the company to profitability and, therefore, it was just and equitable to wind up the company.

3. The company as well as Chloro Controls (India) Private Limited opposed the admission of the company petition by filing reply affidavits. The company objected to the maintainability of the petition for winding up on the ground that the petitioner was not a shareholder on the company's register and, therefore, has no standing to maintain the petition for winding up. The company stated that Capital Control (Delaware) Corporation is the registered holder of 50% of the equity share capital of the company. It is stated that the merger of Capital Controls (Delaware) Company Inc. into and with the petitioner was not intimated to the company prior to the filing of Arbitration Petition No.121/2004 by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996. That at no point of time until the date any application for mutation of share certificates and/or substitution of the name of the petitioner had been made. The objection was also set up that the assignment of shares by the

Capital Controls (Delaware) Company, Inc. to the petitioner without the consent of Chloro Controls (India) Private Limited or for that matter of M.B.Kocha was contrary to the shareholders agreement and could not be given effect to.

4. The petitioner filed its rejoinder on 4th December 2004 and explained its position regarding the merger. The petitioner annexed certain documents which in its opinion were the merger documents and submitted that the company as well as the Kochas had all along accepted the petitioner as shareholder and that there was no 'assignment' as contemplated under clause 24 of the Shareholders agreement and, therefore, consent of Chloro Controls (India) Private Limited or of M.B.Kocha was not required. The petitioner, in the rejoinder, asserted that it has stepped into the shoes of Capital Controls (Delaware) Company Inc. and entitled to maintain the petition for winding up.

5. On 3rd February, 2005 sur-rejoinder was filed on behalf of the company and it was denied that the petitioner had stepped into the shoes of Capital Controls (Delaware) Inc. The company also questioned legality and veracity of merger documents that were relied upon by the petitioner.

6. The learned Company Judge admitted the Company Petition indicating prima facie, the reasons; (one) that the shareholding of Capital Controls (Delaware) Inc. has vested in the petitioner in the light of the amalgamation/merger; (two) that there was no breach of shareholders agreement since the agreement did not prevent the merger of two companies; (three) that the provisions of Section 439(4)(b) of the Companies Act pertaining to devolution through death of a former holder were applicable in the present case and (four) that there was complete deadlock in the functioning of the business of the company because there are only two shareholders and both the shareholders are holding 50% equity capital; unless both the shareholders concur in conducting the business of the company the business cannot be proceeded with and/or carried on and the company cannot be allowed to function and run in that way.

7. The learned senior counsel for the parties argued the appeal at great length. We wondered if it was really necessary as the appeal arose out of an order of admission of winding up petition and the main issue for our consideration was the standing of the petitioner in maintaining the petition for winding up order.

8. Mr.S.H.Doctor and Mr.D.D.Madon, the learned senior

counsel for the appellant-Chloro Controls (India) Private Limited in Appeal No.449/2005 made the following submissions:

(a) The petition for winding up the company was not maintainable at the instance of the petitioner because the petitioner is not registered shareholder of the company.

(b) The petition is an abuse of process as before the petition came to be admitted by the Court, the petitioner issued premature advertisement on 18th December 2004.

(c) In the light of the order passed by the learned Single Judge on 23rd December, 2004 in the Suit filed by the appellant and the order of the Appeal Bench on 15th February, 2005, the issue of deadlock and the alleged breaches on the basis of which the company petition is filed being squarely an issue in the previously instituted Suit by the appellant, the order of admission of the company petition ought not to have been passed.

(d) The appropriate remedy for the redressal of the grievance raised in the petition lies under Sections 397 and 398 of the Companies Act and since the alternate remedy is available to he petitioner, the petition for

winding up was liable to be dismissed.

(e) If at all there is any deadlock in the company, it is caused by the petitioner and the petitioner cannot be permitted to seek advantage of its own wrong.

(f) The Power of Attorney dated 15th March, 2004 does not grant any specific power to institute winding up petition and, therefore, the winding up petition has been filed without authority.

(g) The petition for winding up is malafide to enable the petitioner to conduct competing business in breach of negative convenants of joint venture agreements.

9. Mr.Shyam Divan, the learned senior counsel for the respondent, on the other hand, supported the order of the learned Company Judge and submitted that prima facie consideration of the matter by the learned Single Judge needs no interference. He would submit that the petition to wind up the company has been filed on just and equitable grounds in two capacities i.e. as a 'creditor' under Section 439(1)(b) and as a 'contributory' under Section 439(1)(c) of the Companies Act. Mr.Shyam Divan submitted that Section 428 defines 'contributory' and the petitioner falls within the ambit of the definition of the contributory. He invited our

attention to the following facts: that the Capital Controls (Delaware) Company Inc. is a part of Severn Trent Group of Companies; that the Capital Controls (Delaware) Company Inc. is the registered and beneficiary holder of 3,75,000 equity share capital of the company, that the company was incorporated in the implementation of the joint venture agreement dated 16th November 1995; that Chloro Controls (India) Private Limited and Capital Controls (Delaware) Company Inc. are joint venture partners in the joint venture company; that the purpose of formation of the company was to fuse and pool together the resources, technology and business of Seven Trent and the Kocha family; that the 50% shareholding of the company is held by Severn Trent through Capital Controls (Delaware) Company Inc. and the balance shareholding of 50% is held by Chloro Controls (India) Private Limited; that before and after the merger of Capital Controls (Delaware) Company Inc. into the petitioner, the directors belonging to Severn Trent have been attending the Board meetings of the company and referred to as Severn Trent directors and not as directors nominated by Capital Controls (Delaware) Company Inc., and that the company has projected on its letterheads that it is a part of Seven Trend Group. The learned senior counsel submitted that from these facts, it would be apparent that the petitioner has right to maintain the petition. He

submitted that Capital Controls (Delaware) Company Inc. has merged with and into the petitioner and that the petitioner has stepped into the shoes of Capital Controls (Delaware) Inc. The learned senior counsel submitted that the petitioner is the holder of shares which are fully paid up and as a holder of shares, even if the petitioner is not a member, it has locus standi to maintain the petition for winding up. Mr.Shyam Divan would submit that in order to be considered a contributory, it is not necessary that the petitioner's name should appear on the Register of Members of the company. He also contended that the petitioner's entitlement to shares does not arise from a transfer in terms of Section 108 of the Companies Act, 1956. In contradistinction to a 'transfer' in the present case, the situation is akin to the legal representative of the dead natural person being recognized by the company and since Capital Controls (Delaware) Inc. has ceased to exist as an entity and the petitioner is the successor entity, it is entitled to maintain the company petition for winding up. Mr.Divan submitted that corporate veil can always be lifted by the Court in appropriate situation and in this case it was clear that Capital Controls (Delaware) Company Inc. was exactly the same as the petitioner inasmuch as it represented the Severn Trent Group. He would submit that the petitioner also fulfils the requirement of Section 439(4)(b) and the

petitioner ought to be considered as a successor of the allottee and the party on whom the shares have devolved and in that situation, the requirement of holding the shares for minimum period would not apply.

10. Mr.Shyam Divan, the learned senior counsel for the petitioner also submitted that there are averments in the petition that the petitioner is a creditor of the company and as on 31st July 2004, the total amount due from the company to the petitioner was US $ 575,113.29. As a creditor, therefore, the petitioner has locus standi to maintain the petition. He would submit that a creditor is entitled to file petition on the just and equitable grounds to wind up the company, particularly where there is loss of substratum. According to him, the joint venture agreement having been terminated, the function of the joint venture company has disappeared and substratum of the joint venture company no longer exists.

11. In response to the argument of the learned senior counsel for the appellant that prior to admission of the company petition, public notice dated 18th December 2004 was issued by the petitioner which was an abuse of process of Court, Mr.Shyam Divan submitted that the facts stated in the public notice being accurate, there was no abuse of process and in the facts and

circumstances of the case, the public notice was justified.

12. The learned senior counsel for the petitioner submitted that the power of Attorney dated 15th March 2004 confers powers to initiate proceedings including the petitions and other proceedings which would cover the authority to file a winding up petition.

13. Mr.Shyam Divan, the learned senior counsel for the petitioner strenuously urged that the two groups are deadlocked and joint venture company has lost its substratum inasmuch as it no longer functions as a quasi-partnership and, therefore, the prima facie consideration of the matter by the learned Company Judge admitting the company petition does not call for any interference. He relied upon the following authorities:

(i) Saraswati Industrial Syndicate Ltd. v. C.I.T. Haryana, Himachal Pradesh, Delhi-III, New Delhi, AIR 1991 S.C.70;

(ii) National Organic Chemical Industries Ltd. & anr. v. State of Maharashtra & ors., Vol. 118 Company Cases 556;

(iii) M/s.World Wide Agencies Pvt.Ltd. & Anr. vs.Margarat T.Desor & ors., (1990) 1 SCC 536;

(iv) Re: Bayswater Trading Co.Ltd., 1970(1) All E.R. 608;

(v) Indian Chemical Products Ltd. v. State of Orissa & anr., A.I.R. 1967 SC 253;

(vi) Syndicate Bank v. Printersall (P) Ltd. & ors., (1991) Vol.71 Company Cases 215;

(vii) M/s.Rajdhani Grains & Jaggery Exchange v. The Punjab Exchange Ltd., 1982 Company Law Journal 174;

(viii) State of U.P. & ors. v. Renusagar Power Co. & ors., A.I.R.1988 SC 1737 and

(ix) Re: Patent Steam Engine Company, 1878 Chancery Division Vol.VIII 464.

14. Mr.Pratik Sakseria, the learned counsel for the company adopted the submissions of Mr.S.H.Doctor and Mr.D.D.Madon, the learned senior counsel who argued for Chloro Controls (India) Private Limited in Appeal No.449/2005.

15. We reflected over the submissions of the learned senior counsel and the counsel appearing for the parties.

16. That the admission of petition for winding up the company has an immediate and potentially damaging effect needs no elaboration. Such order of admission is seriously prejudicial to the Company affecting it to a great extent. In this view of the matter, the standing of the petitioner to maintain the petition for winding up order has to be clearly established before an order of admission is made. The Company as well as Chloro Controls (India) Private Limited (50% shareholder of the

company) have raised preliminary objection about the maintainability of the Company Petition on the ground that the petitioner is not a registered holder of the company. The question, therefore, that needs to be addressed in these Appeals is, whether Severn Trent Water Purification Inc. (petitioner) has a standing to petition for winding up order under Section 433(f) of the Companies Act, 1956.

17. We refer to the broad facts first.

18. In paragraph 1 of the petition, the petitioner set up the case that Capital Controls (Delaware) Company Inc. merged with and into the petitioner on 31st March, 2003 and pursuant to the merger, Capital Controls (Delaware) Inc. went out of existence. In the petition, not much facts are averred concerning merger. However, in the rejoinder dated 4th December, 2004 the position regarding the merger has been elaborated and certain documents annexed.

19. Legal position is well settled that foreign law is a question of fact and must be pleaded by the parties who relies upon it. The petitioner has not pleaded about the relevant laws of merger. The documents that have been placed on record only show that certain documents were filed by the petitioner in the Office of

the Secretary of the State of Delaware. Nothing is pleaded about its legal effect. These documents only show that the certificate of ownership and merger merging Capital Controls (Delaware) Inc. (Delaware Corporation) into Severn Trent Water Purification Inc. were filed before same authority. In the absence of pleading of relevant laws of merger prevalent in the State of Delaware or under the law of the commonwealth of Pannsylvania under which merger is said to have taken place, it is very difficult to examine the aspect as to whether by virtue of the said merger, there is blending of the two entities and the status of the two companies thereafter.

20. The Company and the other shareholder have raised serious doubts in respect of the petitioner's contention with regard to the merger of the two companies on 31st March, 2003 by relying minutes of the Annual General Meeting dated 9th October, 2003, letter dated 9th October, 2003 in terms of Form No.22-A, the Praecipe dated 5th March 2004 and the order dated 26th February 2004.

21. For the present we assume that Capital Controls (Delaware) Company, Inc. has merged with Seven Trent Water Purification Inc. To answer the question whether the petitioner has standing to maintain the petition for

winding up order, we shall briefly survey the relevant statutory provisions of the Companies Act, 1956.

22. Section 439 provides for the qualification in respect of the person who can present the petition for winding up. It reads thus:

**Provisions as to applications for winding up.**

**439.** (1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, -

(a) by the company; or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) by any contributory or contributories; or

(d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately; or

(e) by the Registrar; or

(f) in a case falling under section 243, by any person authorised by the Central Government in that behalf.

(2) A secured creditor, the holder of any debentures (including debenture stock) whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub-section (1).

(3) A contributory shall be entitled to present a petition for winding up a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all, or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities.

(4) A contributory shall not be entitled to present a petition for winding up a company unless-

(a) either the number of members is reduced, in the case of a public company, below seven, and, in the case of a private company, below two; or

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder.

(5) Except in the case where he is authorised in pursuance of clause (f) of sub-section (1), the Registrar shall be entitled to present a petition for winding up a company only on the grounds specified in clauses (b), (c), (d), (e) and (f) of section 433;

. **Provided** that the Registrar shall not present a petition on the ground specified in clause (e) aforesaid, unless it appears to him either from the financial condition of the company as disclosed in its balance sheet or from the report of a special auditor appointed under section 233A or an inspector appointed under section 235 or 237, that the company is unable to pay its debts:

. **Provided** further that the Registrar

shall obtain the previous sanction of the Central Government to the presentation of the petition on any of the grounds aforesaid.

(6) The Central Government shall not accord its sanction in pursuance of the foregoing proviso, unless the company has first been afforded an opportunity of making its representations, if any.

(7) A petition for winding up a company on the ground specified in clause (b) of section 433 shall not be presented -

(a) except by the Registrar or by a contributory; or

(b) before the expiration of fourteen days after the last day on which the statutory meeting referred to in clause (b) aforesaid ought to have been held.

(8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the Court shall be obtained for the admission of the petition and such leave shall not be granted -

(a) unless, in the opinion of the Court, there is a prima facie case for winding up the company; and

(b) until such security for costs has been given as the Court thinks reasonable.

23. Unless the petitioner falls in any of the categories enumerated in clauses (a) to (f) of Section 439(1), the petition for winding up shall not be maintainable. Before the learned Company Judge in response to the objection raised by the present appellants that the petition for winding up was not maintainable, on behalf of the petitioner, it was argued

that the petitioner is the contributory and/or shareholder of the company and covered under Section 439(1)(c) and therefore, the company petition is maintainable. Alternatively, it was argued that the original shareholder viz., Capital Controls (Delaware) Company Inc. having ceased to exist by virtue of amalgamation amounts to death of the company and, thus, the shares have devolved on the petitioner by operation of law.

24. Section 41 defines the "member" of the company thus:

> **Definition of "member".**
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> **41**.(1). The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.
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> (2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.
>
> (3) Every person holding equity share capital of company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

25. As per clause (2) of Section 41, a person who agrees in writing to become a member of a company and whose name is entered in the register of members is a

member of the company.

26. Section 108 provides that a company shall not register transfer of shares unless a proper instrument of transfer is delivered to the company along with certificate. Section 108(1) reads thus:

> **108(1).** A company shall not register a transfer of shares in, or debentures of the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transfer, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures:
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> **Provided** that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of transfer, it is proved to the satisfaction of the Board of directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit:
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> **Provided further** that nothing in this section shall prejudice any power of the company to register as shareholder or debenture-holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law.

27. Section 109 deals with the transfer of shares by the legal representative of the deceased member of the company. Section 109A is in respect of the nomination of shares and Section 109B provides for transmission of

shares.

28. Section 110 provides for an application of registration for transfer of shares or other interest of a member in a company and that may be made either by the transferor or by the transferee. Section 110 reads thus:

> 110.(1) An application for the registration of a transfer of the shares or other interest of a member in a company may be made either by the transferor or by the transferee.
>
> (2) Where the application is made by the transferor and relates to partly paid shares, the transfer shall not be registered, unless the company gives notice of the application to the transferee and the transferee makes no objection to the transfer within two weeks from the receipt of the notice.
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> (3) For the purposes of sub-section (2), notice to the transferee shall be deemed to have been duly given if it is despatched by prepaid registered post to the transferee at the address given in the instrument of transfer, and shall be deemed to have been duly delivered at the time at which it would have been delivered in the ordinary course of post.

29. Section 111 provides for a legal remedy of an appeal when a company refuses to register transfer of shares or transmission of shares by operation of law.

30. A "contributory" is defined in Section 428:

> 428. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up,

> and includes the holder of any shares which are fully paid-up; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

31. The term "contributory" under Section 428 includes the holder of any shares which are fully paid-up. The Courts have held that the words, "holder of shares", "shareholder" and "member" are synonyms in so far as the Companies Act are concerned and the said expressions have been interchangeably used. In this view of the matter, the words, ‘holder of shares’ has to be read to mean ‘member’ as defined in Section 41. The petitioner is not covered by the definition of member in Section 41.

32. Even if we assume that the petitioner is contributory under Section 428, merely being contributory shall not cloathe the petitioner to maintain the petition for winding up order unless the conditions in Section 439(4)(b) are met.

33. Clause (b) of sub-section (4) of Section 439 provides that a contributory shall not be entitled to present the petition for winding up a company unless, the shares of which he is a contributory or some of them (one) were originally allotted to him or (two) have been

held by him and registered in his name for at least six months during the eighteen months immediately before the commencement of the winding up or (three) have devolved on him through the death of a former holder.

34. The petitioner is not an original allottee of the shares in the company. An allotment of a share involves a transaction between a company and an intending shareholder. In this case the petitioner does not suggest that their claim emerges from any transaction they had with the company.

35. The petitioner admittedly is not the holder of shares having those shares registered in its name on the register of the company.

36. The learned Company Judge applied the expression, "or have devolved on him through the death of former holder" on the analogy that upon merger/amalgamation, Capital Controls (Delaware) Company, Inc. has met its death and the shares held by the said company are devolved on the petitioner by operation of law.

37. We are afraid, the analogy drawn by the learned company Judge is wholly fallacious. The category, "or have devolved on him through the death of former holder" is applicable only to personal representative of a

person holding shares in the company in his individual capacity. The said expression applies to devolution of rights on the death of natural person and has no application to a corporate entity or the juristic person. The submission of Mr.Shyam Divan that these words could also be applied to the company which has ceased to exist like the Courts have held that the corporate entity was liable to be contempt jurisdiction of the Court does not appeal us. If we accept the reasoning of the learned Company Judge and the submission of the learned senior counsel for the petitioner, it would be tampering with the plain language used in the last category of clause (b) of subsection (4) of Section 439 which we cannot do.

38. We, thus, find ourselves in total disagreement with the view of the learned Company Judge that Section 439(4)(b) does not restrict the petitioner from filing the petition for winding up because it falls in the last category i.e. "or have devolved on him through the death of the former holder".

39. Though we are unable to approve the view of the learned Company Judge that in case of amalgamation, the shareholding of erstwhile company (Capital Controls (Delaware) Company, Inc.) stood automatically transferred and vested to a transferee company (Seven

Trent Water Purification Inc.) and the petitioner became a successor holder of the said shares by operation of law as there is nothing to justify such observation as we have already indicated above that the facts about the law of merger prevalent in the State of Delaware and the State of Pennsylvania have not been pleaded anywhere in the company petition or in the rejoinder, yet assuming that to be so, the requirement of Section 439(4)(b) has to be mandatorily met to maintain the petition for winding up. Sub-section (4) of Section 439 is an express statutory provision as to the qualification of a contributory to present a petition for winding up order and that cannot be modified by saying as has been done by the learned Company Judge that the petitioner company as a transferee company has become successor holder of the said shares by operation of law and, therefore, entitled to maintain the petition for winding up.

40. The view that we have taken finds support from the judgment of the Court of Appeal in the matter of **Re: Gattopardo Ltd., 1969(2) All E.R. 344**. That was a case where the petitioner who presented the petition for winding up of the company was not registered in respect of his shareholding until 9th October 1968. The petition was presented on 18th December 1968. Dealing with the statutory provisions contained in Section 224(1)(a) of the Companies Act, 1948 (the said provision

is pari materia with Section 439(4)(b) of our Companies Act, 1956), the Court of Appeal held that on he true construction of Section 224, the right of contributory to present a petition for winding up was expressly denied unless the shares had been held and registered in the company's name for at least six months during the eighteen months before the commencement of the winding up and since the shares held by the petitioner were not registered for the period required in law, the petitioner had no locus standi to present the petition. Russell,L.J. who delivered the judgment in Re: Gattopardo Ltd. held thus:

> " In this case, however, whatever the true facts may be about the relationship between Mr.Avanzo and Mr.Fialko, the fact remains that the only order in existence relating to these shares or any of them was the consent order to which Mr.Avanzo alone was a party, and not the company and not even Mr.Fialko, and in those circumstances, even if I may assume that the decision of Sir James Bacon, V.C., (3), was a correct decision-and I reserve my own judgment on that point without intending to indicate either that it was correct or incorrect-there seems to me to be a world of difference between that case and the present case in which it could not be said that the company was bound at any stage before 9th October 1968, let alone at a stage six months before the presentation of the petition, to register the petitioner as a shareholder.
>
> . What happened to the transfer form, which we are told on instruction was sent presumably at a stage long before the battle in the Queen's Bench Division to the company, we do not know. All we know on the facts as they are presented to us is that in fact no board of directors met to consider this transfer

until 9th October 1968. Why that should happen, whose fault that was, I know not, but certainly the case has not been made out in any satisfactory way to suggest that here is Mr.Fialko in respect of 50 shares, having bound himself by executing a transfer, and Mr.Avanzo, having bound himself by contract and a consent order, dragging their feet so as in some way to prejudice the petitioner. She seems to have taken no step whatsoever after the consent order in April to ginger up the company or the board of directors into getting herself on the register. It seems to me that she has only herself, unfortunately, to thank for the fact that it was within six months of the actual registration that the matters of which she complains in the substance of the petition arose.

. Even if the facts were plainly stated to suggest that the 100 per cent, shareholders had been dragging their feet, even if that were shown and shown plainly, I would not for myself extend the Patent Stem Engine case (3) to such a situation; but in any event such a situation is not demonstrated here.

. I am left with the plain language of the section, and I find myself entirely able to agree with the remarks made in the course of argument by VAUGHAN WILLIAMS, J. in Re A Company (4) where it was argued that (5)-

> "The company allotted the shares to the wrong person, and ought not to be allowed to avail themselves of sect.40 of the Companies Act, 1867 (which was the comparable section). In equity what ought to have been done must be taken as having been done, and the petitioner should be treated as an original allottee."

VAUGHAN WILLIMS, J.interjected (5):

> "There is an express statutory provision as to the qualification of a contributory to present a winding up petition, and that cannot be modified by saying that he ought to be in a position in which he is not. The provisions of sect.40 are not complied with, and I see no reason why

> the company should not set up that defence."

> I echo those words. I think that the judgment below was perfectly correct, and, as I say, I reserve for a further occasion consideration whether the exception in the Patent Steam Engine case (6) is one which is to be supported."

41. The learned senior counsel for the petitioner, however, relied upon the judgment of Chancery Division in Re:Patent Steam Engine Company in support of his contention that the petition for winding up may be presented by a person who is holder of share in the company although his name is not on the register at the time of presentation of the petition. In that case by an order of the Court, the Company was ordered amongst other things to allot to the petitioners certain amount of preference shares in the company in certain specified proportions and to register them as holders of the said respective shares and to issue to them proper certificates for the same. The objection was raised that the Court has no jurisdiction to make a winding up order on the petition of the persons who are not in fact the registered shareholders though they may be entitled to become shareholders and to be registered. Bacon,

V.C. dealing with the objection observed thus:

> "In my opinion the technical objection has no weight. The petitioners have been declared by the Court entitled to be shareholders, and the company have been ordered to allot them these shares, and to register them as shareholders

> in respect of them. These orders the company have failed to comply with, and it is only through their default that the petitioners' names were not on the register upwards of six months ago.
>
> . As to the rest, enough has been stated to show that the petitioners are entitled to the relief they seek, and there must be the usual compulsory order."

42. The decision in the case of Patent Steam Engine Company is of no help to the petitioner for more than one reason. First, the fact situation in Patent Steam Engine Company and the present case is entirely different. In that case, the Court had ordered the company to allot to the petitioners certain specified preference shares and to register them as holders of the respective shares. Based on the entitlement of the petitioner under the order of the Court, the Chancery Division found that the petition for winding up can be maintained who is not in fact registered shareholder though he is entitled to become shareholder and to be registered. In the present case, admittedly despite the merger and amalgamation, the petitioner at no point of time had applied to the company for rectification of the register and registration of shares in their name. It is no explanation that as the dispute has arisen between the Kocha Group and the petitioner, even if the petitioner had applied for registration of the shares held by them in their name, the company would not have registered the said shares in the name of the

petitioner. Had the petitioner applied for registration of shares and the company refused to register them in the name of the petitioner on the register of the company, the petitioner had the legal the remedy under Section 111 of the Companies Act to file an appeal against an order refusing registration. Secondly, we have reservation about the correctness of the view taken by the Chancery Division in Patent Steam Engine Company. And, thirdly, the qualification of the contributory as provided in Section 439(4)(b) to maintain the petition for winding up has to be mandatorily satisfied and, therefore, we find no justification to extend the view taken in Patent Steam Engine Company. We agree with the view of Russel,J. in Re: Gattopardo to disagree with the view in Patent Steam Engine Company.

43. The learned senior counsel for the petitioner would submit that in order to consider as a contributory, it is not necessary for the petitioner's name to appear on the register of members. He relied upon the judgment in the case of Shakuntala Rajpal v. Mckenzie Phillip (India) Pvt.Ltd., **1988 (64) Company Cases 585** and the judgement of Chancery Division in Re:Basewater Trading Co.Ltd., **1970(1) All ER 608.** Both these cases upon which reliance is placed by the learned senior counsel hold that personal representative of a shareholder is entitled to present a petition for winding up of the

company although he is not on the register of shareholders and the word "contributory" must be construed accordingly. This argument would have merit if the petitioner was covered by the last category of clause (b) of subsection (4) of Section 439 i.e., "have devolved on him due to death of a former holder". We have already indicated and we need not repeat that this category cannot be applied to a holder of shares other than natural person. It is not applicable to the juristic or corporate entity.

44. Mr.Shyam Divan, the learned senior counsel for the petitioner, also submitted that when two companies amalgamate and merge into one, the transferor company looses its entity and cease to exist and that is what happened in the present case and since the corporate entities are recognised and are essentially instrument of modern business commerce, the petitioner being group entity must be recognised being entitled to maintain the winding up petition. In support of his contention, he relied upon the judgment of the Supreme Court in the case of Saraswati Industrial Syndicate Ltd. vs. C.I.T.Haryana, **A.I.R.1991 SC 70** and the judgment of this Court in the case of National Organic Chemical Industries Ltd. v. State of Maharashtra, **2004 (118) Company Cases 556.**

45. In the case of Saraswati Industrial Syndicate Ltd., the Apex Court explained the concept of amalgamation of two companies by observing thus:

> "5. Generally, where only one company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending company become substantially the share holders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsbury's Laws of England 4th Edition Vol. 7 Para 1539. Two companies may join to form a new company, but there may be absorption or blending of one by the other both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

46. Then in paragraph 6 of the report, the Apex Court observed thus:

> "6. ..... This court in appeal held that under the order of amalgamation made on the basis of the High Court's order, the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes. This decision lays

down that after the amalgamation of the two companies the transferor company ceased to have any entity and the amalgamated company acquired a new status and it was not possible to treat the two companies as partners or jointly liable in respect of their liabilities and assets. In the instant case the Tribunal rightly held that the appellant company was a separate entity and a different assessee, therefore, the allowance made to Indian Sugar Company, which was a different assessee, could not be held to be the income of the amalgamated company for purposes of Section 41(1) of the Act. The High Court was in error in holding that even after amalgamation of two companies, the transferor company did not become non-existent instead it continued its entity in a blended form with the appellant company. The High Court's view that on amalgamation there is no complete destruction of corporate personality of the transferor company instead there is a blending of the corporate personality of one with another corporate body and it continues as such with the other is not sustainable in law. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceased to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."

47. The Division Bench of this Court in **National Organic Chemical Industrries Ltd & anr.** reiterated the legal position that a company loses its corporate personality or is deemed to be destroyed on amalgamation from a date declared by the Competent Authority about the Companies Act.

48. The aforesaid two decisions exposit the legal

position that when two companies merge into one, the transferor company ceases to exist. In that event, the transferor company ought to have applied to the company for their registration on the company's register of members which they never did. The transferee company ipso facto and automatically does not become entitled to file the petition for winding up as contributory without it being registered on the register of the company as contemplated under clause (b) of sub-section (4) of Section 439. The qualification of a contributory provided in Section 439(4)(b) for standing to the petition for winding up cannot be departed by the Court as this is the statutory eligibility prescribed.

49. The contention of Mr.Shyam Divan, the learned senior counsel for the petitioner that by merger of Capital Controls (Delaware) Company Inc. into and with the petitioner, no transfer as contemplated under Section 108 of the Companies Act has taken place and that there is transmission of shares by operation of law is noted to be rejected. In General Radio & Appliances Co.Ltd. & ors. v/s.M.A.Khader, the Apex Court has treated a merger as involving a transfer/assignment of assets. Even Section 394 of the Companies Act that provides for facilitating the reconstruction and merger of companies uses the expressions, "transferor company" and "transferee company". Obviously, therefore, the

Indian law contemplates a merger or amalgamation as a process of involving a transfer/assignment of assets and liabilities. The relevant American Law is not pleaded. In so far as the transmission of shares by operation of law is concerned, again the relevant American Law has not been pleaded. In any case, in so far as the standing to the petition for winding up order by a contributory is concerned, the petitioner has to meet the eligibility provided by Section 439(4)(b) which, in our opinion, the petitioner has miserably failed to meet.

50. The learned senior counsel for the petitioner also sought to contend that the Capital Controls (Delaware) Company Inc. is a 100% subsidiary of the petitioner and the Capital Controls (Delaware) Company Inc. was exactly the same as the petitioner inasmuch as it was represented by Severn Trent Group and to that extent, the Court must lift the corporate veil. In this connection, he relied upon the judgment of the Supreme Court in the case of State of U.P. & ors. v. Renusagar Power Co. & ors. **(AIR 1988 SC 1737)**. This is an argument in desparation. Legal position is settled that under the Company Law, the party who approaches the Court cannot ask the Court to lift the corporate veil. In BBN (UK) Ltd. & ors. v. Janardan Mohandas Rajan Pillai & ors., **1993(3) Bom.C.R.228**, the

learned Single Judge of this Court observed thus:

> "12. Under Indian Company Law, the word ‘member’ is synonymously used with the word "shareholder". Therefore, it is only a person who is on the Register of Members of the Company who is a member/shareholder of the Company. Neither the 1st plaintiff nor the 2nd plaintiff is a person who is on the Register of Member of the 7th defendant Company. Hence, plaintiffs 1 and 2 are not shareholders/members of the 7th defendant company. Further, under the said Act, certain rights are given only to members e.g. the right to vote, apply for winding up, get notice of Annual General Meeting, to remain present at the Annual General Meeting, to receive dividend, to apply for investigation of Company affairs, to inspection, and to form part of quorum. Plaintiffs 1 and 2 not being members cannot exercise any of the aforesaid rights nor any other rights conferred only on members by the said Act. It is now well settled law that no claims by one whose name is not on the Register of Members of a Company be made against the Company. In the case of (Howrah Trading Co.Ltd. v. Commissioner of Income Tax, Central Calcutta), reported in A.I.R.1959 S.C.775, it has been held by the Apex Court that words ‘member’, ‘shareholder’ and ‘holder’ of a share have been used interchangeably under the provisions of The Indian Companies Act, 1913. It is further held that the words ‘holder of a share’ are really equal to the word ‘shareholder’ and the expression ‘holder’ of a share denotes in so far as ‘the Company is concerned only a person who, as a ‘shareholder’, has his name entered on the Register of Members. The Supreme Court in the case of (Balkrishan Gupta & others v. Swadeshi Polytex Ltd. & another), reported in A.I.R.1985 S.C.520, has further held that even if a Receiver is appointed of shares he has no right to vote and only the member on the register has the right to vote. It has also been held that ownership of a share denotes the relation between a person and any right that is vested in him. As held by the Supreme Court in the case of (Narandas Karsondas v. S.A.Kaustam & another), reported in A.I.R.1977 S.C.774 in India, there is no distinction between legal and equitable estates. The law

of India knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Relying upon (Rani Chhatra Kumari v. Mohan Bikram), reported in A.I.R.1931 P.C.196, it has been held that under the Indian Laws, there can be but one owner that is, legal owners. In (Killick Nixon Ltd. & others v. Bank of India & others), reported in (1985) 57 Company Cases 831, a Division Bench of this Court has held that under section 41(2) of the said Act, a person whose name is entered in the register of members shall be a member of the Company. The contentions of the plaintiffs that the Court can take cognisance of a trust as per (Dharwar Bank v. Mohamed Hayat), 33 Bom.L.R.250, is contrary to section 153 of the said Act which has an overriding effect because of section 9 of the said Act. In any event, there is no trust qua the plaintiffs 1 and 2. No such trust can be said to have arisen or exist under Indian Law in favour of plaintiffs 1 and 2. No such trust can be said to have arisen or exist under Indian Law in favour of plaintiffs 1 and 2. The only exception given by the Supreme Court in the case of (World Wide Agencies Pvt.Ltd. v. Mrs.Margarat T.Desor), reported in A.I.R. 1990 S.C.737, is where under section 397 a legal representative whose name was not on the register of members but whose name ought to have been brought was considered to be a person who could apply under section 397 of the said Act. In that case letters of administration were obtained, companies articles recognised interest and title of legal representatives and Court held a right has devolved on legal representatives. In the instant case, the plaintiffs 1 and 2 have no such right in law either to be on the register of members or to be brought on the register of members of the 7th defendant Company. Neither the Courts in India nor in UK have allowed a non-member to maintain a derivative action. The plaintiffs 1 and 2 also do not fit into the exceptions laid down in (Bhajekar v. Shinkar), reported in 36 Bom.L.R. 483 and (Satyavat v. Arya Samaj, Bombay), reported in 48 Bom.L.R.341."

51. We approve the observations of the learned Single

Judge in this regard.

52. In what we have discussed above, we have no hesitation in holding that the petitioner as contributory has no standing to maintain the petition for winding up order under Section 433(f) read with Section 439 of the Companies Act.

53. The learned senior counsel for the petitioner also urged before us that the petition for winding up order is in the capacity of creditor as well.

54. This aspect was not canvassed by the petitioner before the learned Company Judge in response to the preliminary objection raised by the appellants that the company petition was not maintainable and, therefore, not considered by the learned Company Judge. We are of the view that this aspect has to be considered by the learned Company Judge before admitting the petition for winding up on the just and equitable grounds in the capacity as creditor. In so far as the reasons that have been indicated by the learned Company judge for admitting the petition are concerned, we find these reasons unsustainable. As already held by us, the petition for winding up order as a contributory under Section 433(f) read with Section 439(4)(b) of the Companies Act, 1956 is not maintainable. Until the

petition is legally maintainable, the issue of deadlock in the company pales into insignificance.

55. We, accordingly, dispose of these appeals by the following order:

(i) The impugned order dated 21st April, 2005 is set aside.

(ii) We hold that the petitioner does not have standing to maintain the petition for winding up order as a 'contributory' unless it is registered on the register of the company of members.

(iii) That as to whether the petition for winding up the company on just and equitable grounds can be maintained by the petitioner as creditor shall be considered by the learned Company Judge and to that extent company petition is remitted back. This aspect shall be considered by the learned Company Judge after hearing the parties before admitting the company petition.

(iv) It will be open to the appellants to oppose admission of company petition on all

available grounds including the ground of premature advertisement.

. No costs.

. Oral prayer for stay of this order is rejected.

**(R. M. LODHA,J.)**

**(ANOOP V. MOHTA, J.)**